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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

WILLIAM MITCHELL et al., Plaintiffs and Respondents, v. PHILIP PEREIRA et al., Defendants and Appellants.	C084883 (Super. Ct. No. STK-CV-UBT-2016-7900)

Defendants Philip Pereira and McDowell Shaw Garcia & Mizell appeal from the trial court's order denying their anti-SLAPP[1] motion. (Code Civ. Proc., § 425.16.)[2] Defendants argue the trial court should have granted their motion premised upon speech

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[1] SLAPP is an acronym for "strategic lawsuit against public participation.

[2] Undesignated statutory references are to the Code of Civil Procedure.

protected by section 425.16, subdivision (e)(2) because the speech at issue was preparatory to, or in anticipation of, litigation.

We affirm the trial court's order.

BACKGROUND

On August 9, 2016, William Mitchell and Fred Berry, acting as guardian ad litem for G.M., I.W., J.S., and U.S. (collectively, the Mitchells), sued various defendants, including causes of action against defendants herein for intentional infliction of emotional distress, deceit (misrepresentation and concealment), and negligent misrepresentation.[3] That complaint alleged the Mitchells were issued an insurance policy by IDS Property Casualty Insurance Company (IDS) for their home, which was in effect from December 11, 2014, to December 11, 2015 (the Policy). The Mitchells suffered two losses due to theft and fire, occurring on October 15, 2015, and October 23, 2015 (the Losses), for which the Mitchells made claims to IDS (the Claims). Rather than objectively investigating the Claims, IDS attempted to prove plaintiff William Mitchell intentionally caused the Losses.

The complaint further alleged IDS retained defendants "to act as its outside claims adjuster, to oversee the investigation into [the Mitchells'] alleged role in causing [the Losses], to conduct an examination under oath of Plaintiff William Mitchell, and to author a letter denying [the] Claims, which letter was sent on December 29, 2015. [¶] . . . [D]efendants . . . , acting as the outside claims adjuster for IDS, wrote to [the Mitchells] to deny their Claims, and to inform them that their Policy of insurance was void." This letter falsely asserted "the [L]osses were the result of an intentional act of an insured" and concealed "that their Policy covered the losses of innocent co-insureds

[3] The Mitchells' fifth cause of action against defendants for aiding and abetting was voluntarily dismissed prior to the motion to strike.

resulting from intentional acts of any insureds" and "was not void as a result of material misrepresentations or concealment by an insured."

Defendants brought a special motion to strike, arguing the Mitchells' complaint arose from defendants' protected speech. In support of that motion, defendants submitted declarations establishing IDS retained defendant McDowell Shaw Garcia & Mizell "concerning the fire and burglary claims filed by William Mitchell and the matter was assigned to attorney Philip Pereira." Defendant Pereira examined William Mitchell under oath and later "sent a letter to William Mitchell, informing William Mitchell that IDS Property Casualty Insurance Company denied his fire and burglary claims."

A copy of the letter denying the Claims was also submitted for the court's consideration. It was addressed to William Mitchell, care of David DeTinne, Integrity First Public Insurance Adjusters. The letter recounted various problems associated with the Claims that had been uncovered as a result of the investigation, including the implausibility of the Claims, given the items taken, and that witnesses saw William Mitchell at his home prior to the first fire, when he was allegedly out of town in Los Angeles. It denied the Claims, concluding that "[a]s a result of the misrepresentations and false statements," the Policy was "voided on October 16, 2015," and thus "there is no coverage for the second loss." The letter advised: "If there is anything contained within this letter with which you disagree and which you believe would materially affect the decision made by IDS Property Casualty, please contact the Company in writing within 14 days of the date of this letter so that the Company can review your concerns or any new information provided to re-evaluate its position." It also informed William Mitchell of his right to have the matter reviewed by the California Department of Insurance.

The trial court denied defendants' motion to strike, incorporating its previous ruling, which found defendants failed to meet their burden to show the acts of the complaint arose from their protected activity. Defendants timely appealed.

DISCUSSION

Defendants argue the December 29, 2015 letter denying the Claims was protected speech under section 425.16, subdivision (e)(2) because it was preparatory to, or in anticipation of, litigation. However, defendants fail to provide citations to proof in the record establishing a prima facie showing this letter fell within that context, and the court's own review has not disclosed such evidence.

Section 425.16 provides a mechanism to combat "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Anti-SLAPP motions are evaluated using a two-step process. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) Under the first step, the court determines "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).)" (*Navellier*, at p. 88.) Only upon that showing, does the burden shift to the plaintiff in the second step to demonstrate "a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); [citation].)" (*Navellier*, at p. 88.) A plaintiff meets this burden by showing " ' "the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Id*. at pp. 88-89.)

"Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we

neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Defendants rely on section 425.16, subdivision (e)(2), which states, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." This can include prelitigation communications. As explained in *People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 824 (*Anapol*): "Communications preparatory to, or in anticipation of, bringing an action are within the protection of the anti-SLAPP statute. [Citation.] If a prelitigation statement concerns the subject of the dispute and is made in anticipation of litigation contemplated in good faith and under serious consideration, it falls within the scope of . . . section 425.16. [Citation.]"

In *Anapol*, the court considered attorney defendants' argument that "the submission of an insurance claim constitutes protected petitioning conduct as both a necessary prerequisite to litigation and prelitigation demand letter." (*Anapol*, *supra*, 211 Cal.App.4th at p. 825.) The court distilled from existing authorities that whether the filing of an insurance claim is protected prelitigation conduct depends on the particular circumstances of the insurance claim. (*Id.* at p. 827.) A claim submitted " '*in the regular course of business*' is not an act in furtherance of the right of petition. [Citation.] However, when the claim is submitted under circumstances demonstrating that the claim was not submitted for payment in the regular course of business, but was instead merely a

necessary prerequisite to expected litigation or was submitted as the equivalent of a prelitigation demand letter, it may constitute protected petitioning activity." (*Ibid.*)

For example, where an insured has already informally and unsuccessfully negotiated with an insurance company and made a decision to sue, the submission of a claim may be protected petitioning activity. (*Anapol*, *supra*, 211 Cal.App.4th at p. 827.) "Similarly, an insured that has already been informed that its claim will be denied may submit the claim in the language of a demand letter, threatening suit if the claim is not paid in full. There, too, submission of the claim would qualify as a protected prelitigation statement in furtherance of the right to petition." (*Ibid.*)

However, these are exceptions to the rule; the "possibility of litigation in the event of nonperformance is not enough to conclude the claim is made in anticipation of litigation contemplated in good faith and under serious consideration." (*Anapol*, *supra*, 211 Cal.App.4th at p. 828.) Further, "an insurance claim cannot be transformed from a simple claim for payment submitted in the usual course of business into protected prelitigation conduct solely on the basis of the subjective intent of the attorney submitting the claim . . . . Whether a particular insurance claim constitutes a claim in the usual course of business or the mere satisfaction of a prerequisite for litigation should not turn on the experience and uncommunicated opinion of the attorney." (*Id.* at p. 829.)

While *Anapol* involved the filing of an insurance claim, we see no reason to treat an insurer's denial of such claim differently. *Beach v. Harco National Ins. Co.* (2003) 110 Cal.App.4th 82 (*Beach*) is instructive on this point. *Beach* concerned an anti-SLAPP motion to plaintiff's claim that the defendant insurer acted in bad faith in the handling of plaintiff's uninsured motorist claim. (*Id.* at p. 93.) That court reasoned that a defendant insurer invokes a right of petition by responding to a plaintiff invoking the same right. (*Id.* at pp. 93-94.) Thus, *Beach* recognized, under appropriate circumstances, communications preparatory to a court action or arbitration may fall under a right to petition protected by section 425.16; however, the mere fact of a coverage dispute does

not automatically implicate the right to petition. (*Beach*, at p. 94.) "[T]hat a dispute exists that might ultimately lead to arbitration does not make every step in that dispute part of a right to petition. Just as plaintiff could not claim that his petitioning rights were invoked the moment he submitted a claim to [defendant insurer] [citation], [defendant insurer] cannot claim that the submission of plaintiff's claim immediately gave rise to [defendant insurer's] own petitioning activities." (*Id.* at pp. 94-95.)

Here, the Mitchells filed the Claims shortly after the Losses in October 2015. Around this same time, the Mitchells retained DeTinne (a public insurance adjuster) to assist them with their insurance claim. Notably, the record does not disclose when the Mitchells retained an attorney, the purpose of the retention of that attorney, or contain any communications between the Mitchells' attorney and either defendants or IDS demonstrating the invocation of the Mitchells' right to petition prior to the denial of the Claims.

Further, IDS retained defendants to act as an *outside claims adjuster*, and defendants apparently performed that function, ultimately issuing the December 29, 2015 letter denying the Claims. This letter and whether it was protected petitioning activity is the crux of this appeal. Defendants characterize this letter as a letter by an attorney to their client's adversary explaining their client's position in an insurance dispute where defendants anticipated a lawsuit would be filed against their client after the denial. We are not persuaded.

We see nothing in the record showing the Mitchells invoked their right to petition prior to the transmission of the letter denying the Claims. We acknowledge that correspondence from DeTinne to IDS on January 3, 2016, copied Edward Kerley, who is the attorney listed on the Mitchells' August 2016 complaint, suggesting that the Mitchells may have retained an attorney by that date. We further note that letter complains of bias against the Mitchells and their unidentified "legal counsel." Nonetheless, retention of an attorney to assist in a claim does not demonstrate the serious contemplation of litigation

of that insurance claim. (*Anapol, supra*, 211 Cal.App.4th at pp. 828-830 [insurance claims made by the insureds' attorneys on behalf of their clients were not protected activities].) Nor does the mere existence of a coverage dispute. (*Beach, supra*, 110 Cal.App.4th at pp. 94-95.) Something more is required.

Thus, having failed to show the Mitchells had invoked their right to petition through the serious contemplation of litigation, defendants have not demonstrated IDS invoked a corresponding right when it denied the Mitchells' Claims. (*Beach, supra*, 110 Cal.App.4th at pp. 94-95.) While we recognize that there may be instances where attorney involvement within the claim procedure may justify a determination that the right to petition has been invoked by a defendant insurer, here, defendants have not made a prima facie showing that the claim denial letter issued by attorneys *acting as an outside claims adjuster* in the normal course of business and in response to the Mitchells' Claims was sent "in anticipation of litigation contemplated in good faith and under serious consideration." (*Anapol, supra*, 211 Cal.App.4th at p. 824.)

Defendants' unsupported assertion that the claim denial letter was generated in anticipation that the Mitchells would bring suit once their claim was denied does not alter this analysis. Putting aside that the declarations in support of the motion to strike do not attest to such a belief, as noted above, the uncommunicated opinions of attorneys do not show anticipation of litigation. (*Anapol, supra,* 211 Cal.App.4th at p. 829.) Further, that documents generated prior to the institution of an action may ultimately be used as evidence in court does not alter their unprotected character. (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc*. (2000) 86 Cal.App.4th 280, 284-285 [allegedly inflated damage reports prepared for submission in support of earthquake claims that ultimately ended up in court were not protected by anti-SLAPP statute].)

DISPOSITION

The trial court's order denying the section 425.16 motion to strike is affirmed. Plaintiffs, the Mitchells, are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/s/
BLEASE, Acting P. J.

We concur:

/s/
HULL, J.

/s/
MURRAY, J.